## PP v. LEILA FATEMI & ANOR

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
ZAKARIA SAM JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: P-05-282-11-2012]
1 DECEMBER 2015

***CRIMINAL PROCEDURE:*** *Charge – Reduction of – Accused persons originally charged with offence of drug trafficking – Offence reduced to custody or control of drugs – Whether justified – Whether supported by evidence – Dangerous Drugs Act 1952, ss. 12(2), 37(da), 39B(1)*

***CRIMINAL PROCEDURE:*** *Appeal – Sentence, against – Appeal by prosecution – Accused persons originally charged with offence of drug trafficking – Offence reduced to custody or control of drugs – Sentence of eight years imprisonment – Whether accused persons ought to be convicted on original charge and sentenced to death – Dangerous Drugs Act 1952, ss. 12(2), 37(da), 39B(1)*

The first respondent ('R1') and the second respondent ('R2') were charged under s. 39B of the Dangerous Drugs Act 1952 ('DDA') for trafficking in methamphetamine. On 19 February 2011, the complainant ('PW9') had approached both R1 and R2 at the Kuala Lumpur International Airport ('KLIA') to examine the two bags they were carrying. Transparent plastic bags containing crystalline substance were found hidden at the bottom layer of each bag which were then confirmed to be methamphetamine. The defence of both respondents were that they were given the bags by R2's fiancee by the name of Farhan. Both of them claimed they had no knowledge of the drugs inside the bags. The trial judge found that the prosecution had failed to prove its case against both the appellants beyond reasonable doubt on the original charge of trafficking. Instead, the court made a finding of custody or control of the drugs under s. 12(2) DDA and punishable under s. 39A(2) of the same Act. The trial judge reduced the charges and accordingly found both the appellants guilty and convicted them. Each of the appellant was sentenced to eight years imprisonment with effect from the date of arrest. Dissatisfied with the said decision, the prosecution appealed. The primary issue that arose was whether the trial judge was right in reducing the charge to one of possession, and consequently whether the respondents ought to be convicted of the original charge and sentenced to death.

**Held (allowing appeal; convicting respondents of original offence and sentencing them to death)**
**Per Zakaria Sam JCA delivering the judgment of the court:**

**(1)** It was the respondents who had raised the name of Farhan, but they had failed to provide the relevant information on Farhan for PW12, the investigating officer, to investigate the truth of the respondents' claim.

When both the respondents were detained by PW6 and then investigated by PW12, they did not mention to PW6 or even PW12 that the bags belonged to Farhan. This was supposed to be the first opportunity to exonerate themselves but they chose to remain silent. This was not the conduct of an innocent person (*Teng Howe Sing v. PP*; refd). (para 21)

**(2)** It was never suggested to PW12 or PW6 that Farhan was the real trafficker and the drugs in the bags were his, and given to the respondents without their knowledge. The late disclosure of the character 'Farhan' until the defence stage suggested that it was an afterthought (*Tan Kim Ho & Anor v. PP*; refd). (para 21)

**(3)** The trial judge had failed to ask, if the bags really belonged to Farhan, what was Farhan's instruction to them once they reached Penang, what to do with the bags or to whom the bags were to be handed over. The lack of instruction by Farhan by itself created doubt on their defence. Thus, the defence of the respondents only amounted to wilful blindness which was not recognised in law. (para 21 & 22)

**(4)** Both respondents were arrested together with their bags and the drugs were found concealed inside their bags to escape the detection by the authorities concerned, which amounted to trafficking in the said drugs into Malaysia. The respondents had failed to raise reasonable doubt in respect of *mens rea* possession of the said drugs, and on the balance of probabilities, had failed to rebut the presumption of trafficking under s. 37(da) of the Act. Thus, the convictions under s. 12(2) DDA and sentences under s. 39A(2) of the same were set aside and substituted with convictions under s. 39B(1) of the Act. Both respondents were sentenced to death. (paras 23-25)

***Bahasa Malaysia*** *Headnotes*

Responden pertama ('R1') dan responden kedua ('R2') dipertuduh di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB') bagi pengedaran methamphetamine. Pada 19 Februari 2011, pengadu ('PW9') telah menghampiri R1 dan R2 di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') bagi memeriksa dua beg yang sedang dibawa mereka. Beg plastik lutsinar mengandungi bahan kristal ditemui tersembunyi di lapisan bawah setiap beg yang kemudian disahkan sebagai methamphetamine. Pembelaan kedua-dua responden adalah bahawa mereka diberikan beg tersebut oleh tunang R2 bernama Farhan. Kedua-dua mereka mendakwa tiada pengetahuan tentang dadah di dalam beg tersebut. Hakim bicara berpendapat pihak pendakwaan gagal membuktikan kes melampaui keraguan munasabah terhadap kedua-dua perayu terhadap pertuduhan pengedaran asal. Mahkamah sebaliknya membuat penemuan milikan atau kawalan dadah di bawah s. 12(2) ADB dan boleh dihukum di bawah s. 39A(2) Akta yang sama.

Hakim bicara mengurangkan pertuduhan dan mendapati kedua-dua perayu bersalah dan mensabitkan mereka. Setiap perayu dihukum lapan tahun penjara bermula dari tarikh penangkapan.Tidak berpuas hati dengan keputusan mahkamah, pihak pendakwaan merayu. Isu yang dibangkitkan adalah sama ada hakim bicara betul dalam mengurangkan pertuduhan kepada pertuduhan milikan dan oleh itu sama ada responden-responden wajar disabitkan dengan kesalahan asal dan dijatuhkan hukuman mati.

**Diputuskan (membenarkan rayuan; mensabitkan responden-responden atas pertuduhan asal dan menjatuhkan hukuman mati)**
**Oleh Zakaria Sam HMR menyampaikan penghakiman mahkamah:**

**(1)** Responden-responden menyebut nama Farhan, tetapi gagal memberi maklumat berkaitan Farhan kepada PW12, pegawai penyiasat, untuk menyiasat kebenaran tuntutan pihak responden. Ketika kedua-dua responden ditahan oleh PW6 dan kemudian disiasat PW12, mereka tidak memberitahu kepada PW6 atau PW12 bahawa beg itu kepunyaan Farhan. Ini sepatutnya menjadi peluang pertama membuktikan mereka tidak bersalah tetapi mereka memilih untuk berdiam diri. Ini bukan kelakuan orang tidak bersalah (*Teng Howe Sing v. PP*; refd)

**(2)** Tidak pernah dicadangkan kepada PW12 atau PW6 bahawa Farhan ialah pengedar sebenar dan dadah di dalam beg tersebut miliknya, dan diberi kepada responden-responden tanpa pengetahuan mereka. Pendedahan lewat tentang watak 'Farhan' hingga peringkat pembelaan menunjukkan bahawa ia adalah pemikiran kemudian (*Tan Kim HO & Anor v. PP*; refd)

**(3)** Hakim bicara gagal menyoal sama ada beg tersebut milik Farhan, apakah arahan Farhan bila mereka sampai di Penang, apa yang harus dibuat dengan beg dan kepada siapa beg harus diserahkan. Kekurangan arahan oleh Farhan telah menimbulkan keraguan terhadap pembelaan mereka. Maka, pembelaan responden hanya terjumlah kepada kebutaan disengajakan (wilful blindness) yang tidak diiktiraf undang-undang.

**(4)** Kedua-dua responden ditahan bersama-sama dengan beg mereka dan dadah ditemui tersembunyi di dalam beg bagi mengelak dikesan oleh pihak berkuasa, yang terjumlah kepada pengedaran dadah ke dalam Malaysia. Responden-responden gagal membangkitkan keraguan munasabah terhadap *mens rea* pemilikan dadah tersebut dan atas imbangan keberangkalian telah gagal menyangkal anggapan di bawah s. 37(da) ADB. Maka sabitan di bawah s. 12(2) ADB dan hukuman di bawah s. 39A(2) ADB diketepikan dan digantikan dengan sabitan di bawah s. 39B(1) ADB. Kedua-dua responden dihukum mati.

**Case(s) referred to:**
*PP v. Badrulsham Baharom [1987] 1 LNS 72 HC* ***(refd)***
*Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC* ***(refd)***
*Teng Howe Sing v. PP [2008] 5 CLJ 186 CA* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 12(2), 37(da), 39A(2), 39B(1)
Evidence Act 1950, s. 8

*For the appellant - Lailawati Ali; DPP*
*For the respondent - N Sivananthan (Syazlin Mansur with him); M/s Sivananthan & Co*

*[Editor's note: For the High Court judgment, please see PP v. Leila Fatemi & Anor [2013] 4 CLJ 716 (overruled).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Zakaria Sam JCA:**

**Background**

**[1]** The first respondent (R1) was charged under s. 39B of the Dangerous Drugs Act 1952 (DDA) for trafficking in 1750.2 grams of Methamphetamine.

**[2]** The second respondent (R2) was charged under the same section of the Act for trafficking 2160.8 grams of Methamphetamine.

**[3]** Both of them were jointly tried.

**Prosecution's Case**

**[4]** On 19 February 2011 at about 8.10pm, the complainant (PW9) and his team of police officers were at the KLIA monitoring the movements of both domestic and international passengers. After an aircraft from Singapore had landed, PW9 spotted R1 and R2 who were acting in suspicious manner. After R1 and R2 had collected their individual baggage, PW9 approached them. PW9 identified himself as a police officer. He communicated with them in simple English language and was sure that both R1 and R2 understood him. He found that they hail from Iran. He asked for their passports. R1 had with him a chocolate-coloured trolley bag (P17) while R2 was carrying a light coloured blue trolley bag (P18).

**[5]** PW9 then directed R1 and R2 to bring their bags to the scanning machine and he asked PW7, a custom officer to scan the bags. PW7 and PW9 then saw suspicious green images inside the two bags which were scanned twice. After the scanning was done, PW9 brought R1 and R2 and their bags to the Narcotics Office at the airport.

**[6]** Upon the instruction of PW9, PW10 and PW6 opened R1's bag (P17) and took out all the clothings. They pressed the bottom of the bag and felt something hidden there. They pulled out the bottom layer and removed the

whole handle and the attached bars. They found one transparent plastic bag containing crystalline substance suspected to be syabu hidden at the bottom layer of the bag. PW9 informed R1 about the finding and R1 cried.

**[7]** PW9 then directed PW11 and Det Cpl Abdul Wahab to open R2's bag (P18). They took out her clothings from the bag. PW11 then pulled out the bottom layer and removed the bag handle. They discovered a transparent plastic packet containing substance suspected to be syabu hidden at the bottom of the bag.

**[8]** R1, R2 and the incriminating exhibits were then handed over to PW12, the investigating officer.

**[9]** The chemist (PW5) confirmed that the substance in the bag P17 contained 1750.2 grams and from R2's bag P18 contained 2160.8 grams of methamphetamine.

**Findings At The End Of Prosecution Case**

**[10]** At the end of the prosecution case, the learned Judicial Commissioner (trial judge) found that the prosecution had failed to make out a *prima facie* case against both respondents. Both accused were acquitted and discharged without their defence being called.

**[11]** Dissatisfied, the prosecution appealed against the said decision. The Court of Appeal allowed the appeal and remitted the cases back to the High Court with the directive to call for their defence.

**Defence Case**

**[12]** Both the respondents chose to give written unsworn statements from the dock which were marked as D39 (R1's statement) and D40 (R2's statement).

**[13]** Based on their written statements, the defence of both respondents are that they were given the bags which contained the drugs by R2's fiancée by the name of 'Farhan'. Farhan was the one who had checked in the bags. Both of them claimed that they had no knowledge of the drugs inside the bags.

**[14]** R1 claimed that she was merely accompanying R2 to Malaysia.

**Findings At The End Of Defence Case**

**[15]** The trial judge found that the prosecution had failed to prove its case against both the appellants beyond reasonable doubt on the original charge of trafficking. Instead the court made a finding of custody or control of the drugs under s. 12(2) DDA and punishable under s. 39A(2) of the same Act. The trial judge reduced the charges and accordingly found both the appellants guilty and convicted them. Each of the appellants was sentenced to eight years imprisonment with effect from the date of their arrest that is 19 February 2011.

**[16]** The prosecution being dissatisfied with the decision, filed this appeal.

**The Appeal**

**[17]** There is only a single issue raised by appellant in this appeal ie, whether the defence of the respondents had cast a reasonable doubt on the prosecution case.

**Our Decision**

**[18]** The gist of the appellants' defence is that they were innocent carriers. The bags belonged to Farhan who had asked them to carry the bags to Malaysia. They had no knowledge of the presence of the drugs hidden inside the bags.

**[19]** PW12 when cross-examined by the learned counsel for R2 admitted that R2 had mentioned Farhan's name. When asked further whether he had tried to trace Farhan, PW12 answered that he had tried to call Farhan through the number which he obtained from R2's handphone but no one answered it. He did not resort to other means to trace Farhan.

**[20]** Upon the above piece of evidence the trial judge concluded:

> It is noteworthy to say that the learned deputy public prosecutor did not re-examine at all on the subject matter 'Farhan' which forms the basis of the defence for SM and indirectly for LF. When the prosecution did not re-examine such an important aspect of the defence from SM and LF, ultimately also for LF, it is deemed that it had accepted the testimony of PW12 in regard the person called 'Farhan' to be true.

**[21]** Obviously the trial judge was very much influenced by this single fact alone when he reduced the charge. The trial judge had however failed to consider the following relevant factors:

(i) It was the respondents who raised the name of Farhan, but they had failed to provide the relevant information on Farhan for PW12 to investigate the truth of respondents' claim;

(ii) When both the respondents were detained by PW6 and then investigated by PW12, they did not mention to PW6 or even PW12 that the bags belonged to Farhan. This is supposed to be the first opportunity to exonerate themselves but they chose to remain silent. This is not a conduct of an innocent person: see *Teng Howe Sing v. PP* [2008] 5 CLJ 186 and *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585;

(iii) It was never suggested to PW12 or PW6 that Farhan was the real trafficker and the drugs in the bags were his, given to the respondents without their knowledge. The late disclosure of the character 'Farhan' until the defence stage, suggests that it was an afterthought defence and of little value: *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236; [2009] 3 MLJ 151;

(iv) PW12 the investigating officer had done fittings on the ladies clothes found in both bags. This is his evidence at p. 140 RR Jld. 2:

> Saya dapati pada beg pertama milik Laila Fatemi pakaian tersebut sesuai dengan bentuk tubuh badan OKT begitu juga pakaian dalam beg kedua sesuai dengan OKT2.

Obviously they were lying when they said that these bags belonged to Farhan. Lying is also a conduct relevant under s. 8 of the Evidence Act; and

(v) The trial judge also failed to ask himself, whether if the bags really belonged to Farhan, what was Farhan's instruction to them once they reached Penang, what to do with the bags or to whom the bags are to be handed over. The lack of instruction by Farhan by itself creates doubt on their defence.

**[22]** We were of the view that the defence of the respondents only amount to wilful blindness which is not recognised in law.

**[23]** Even if we were to accept the fact that Farhan was the actual trafficker, it does not detract the fact that both respondents were arrested together with their bags and that the drugs were found concealed inside their bags to escape the detection by the authorities concerned, which amounted to trafficking in the said drugs into Malaysia.

**[24]** We found that the respondents had failed to raise reasonable doubt in respect of *mens rea* possession of the said drugs, and on the balance of probabilities failed to rebut the presumption of trafficking under s. 37(da) of the Act.

## Conclusion

**[25]** In exercising our jurisdiction under s. 60 of the Court of Judicature Act, we unanimously allowed the appeal by the prosecution. The convictions under s. 12(2) DDA and sentences under s. 39A(2) of the same are set aside and substituted with convictions under s. 39B(1) of the Act and both the respondents are sentenced to death.